

Hugh J. Morgan
James T. Hendrick
Robert Cintron, Jr.
Derek V. Howard

LAW OFFICES
MORGAN & HENDRICK
317 WHITEHEAD STREET
KEY WEST, FLORIDA 33040
TELEPHONE 305.296.5676
FACSIMILE 305.296.4331

W. Curry Harris
(1907-1988)
Hilary U. Albury
(1920-1999)

FAX TRANSMISSION

TO: Mayor Dixie Spehar (292-3466)
Mayor Pro Tem Charles McCoy (292-3577)
Commissioner George Neugent (872-9195)
Commissioner David Rice (289-6306)
Commissioner Murray Nelson (852-7162)
Richard Collins, Esq. (292-3516)
Thomas J. Willi (292-4544)
Tim McGarry (289-2854)

FROM: Teresa Ross for Derek V. Howard, Esq.

DATE: June 1, 2005

SUBJECT: Growth Management Litigation Report

Total number of pages including this cover sheet:

ORIGINAL DOCUMENT(S):

☒ **X** WILL NOT BE SENT ☐ WILL BE SENT
☐ REGULAR ☐ OVERNIGHT

COMMENTS: Our File # 160-01

The information contained in this facsimile message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address VIA the U. S. Postal Service. If you do not receive all pages, please call back as soon as possible 305-296-5676. The following is our fax number 305-296-4331.

P.O. Box 1117, KEY WEST, FL 33041 \$ TELEPHONE 305 296-5676 \$ FACSIMILE 305 296-4331

GROWTH MANAGEMENT LITIGATION REPORT

TO: Board of County Commissioners
Richard Collins
County Attorney
Timothy McGarry
Director, Growth Management Division
Thomas J. Willi
County Administrator

FROM: Derek Howard, Esq.
Morgan & Hendrick

DATE: June 1, 2005

Vacation Rentals

Neumont (Federal Class Action) – Plaintiffs filed a class action suit in U.S. District Court alleging vacation rental ordinance (Ordinance 004-1997) was prematurely enforced, is an unconstitutional taking of Plaintiffs' properties, and was adopted in violation of due process. On June 20, 2004, the U.S. District Court entered final judgment in favor of the County. On July 15, 2004, Plaintiffs/Appellants filed a notice of appeal to the U.S. Court of Appeals for the 11th Circuit from final judgment of the District Court, and all interlocutory orders giving rise to the judgment. On September 15, 2004, Appellants filed a motion to certify state-law questions to the Florida Supreme Court and to postpone briefing pending certification; the County filed its response on October 7; Appellants filed a reply on October 15, 2004. On October 18, 2004, a mediation conference was held. On October 19, 2004, the Court denied Appellants' motion to stay briefing and ruled motion to certify state-law questions to the Florida Supreme Court is carried with the case. Appellants filed their initial brief on December 15, 2004. Monroe County filed its response brief on February 22, 2005. Appellants filed their reply brief on March 11, 2005. On April 7, 2005, Monroe County filed a motion for leave to file a surreply brief in response to Appellants' new argument relating to the Class Action Fairness Act of 2005. On April 21, 2005, Appellants filed their response to Monroe County's motion, which included a declaration of a local property manager offered as support for Appellants' assertion that a majority of the subject class members are out-of-state residents. On April 27, 2005, Monroe County filed a motion to strike the declaration, which was denied on May 25, 2005. On May 2, 2005, the Court entered an order granting Monroe County's motion for leave to file a surreply brief; brief was filed on May 24, 2005. Parties are awaiting setting of oral argument. (\$122,759.76 as of April 30, 2005).

Takings Claims

Emmert - Complaint seeking inverse condemnation based on partial granting of beneficial use application. Plaintiffs were granted partial beneficial use from wetland regulations, thus expanding the buildable area of their vacant Ocean Reef lot from approximately 1,800 to 2,500 square feet. However, Plaintiffs argue that they cannot build within this area due to Ocean Reef Club Association deed restrictions requiring setbacks in excess of those required by Monroe County. Plaintiffs allege that

Monroe County's actions have resulted in a denial of all economic use of their property, despite expressly allowing a 2,500 square foot buildable area. Monroe County's motion to dismiss was denied on December 12, 2002. Mediation was held on October 21, 2004. Case was set for bench trial on November 29, 2004. On November 22, 2004, Plaintiffs filed an emergency motion for continuance; motion was heard and granted on November 24, 2004. On November 22, 2004, Plaintiffs also filed a motion for leave to file a second amended complaint in order to add a claim of vested rights. The motion was heard on January 5, 2005. On March 10, 2005, the court entered an order granting Plaintiffs' motion for leave to file a second amended complaint; the complaint was filed on March 31, 2005. On March 31, 2005, Plaintiffs also moved for the entry of default judgment against the County for failure to file an answer to the second amended complaint (despite the fact that the second amended complaint was not previously filed); the County moved to strike Plaintiffs' motion on April 4, 2005. The County timely filed its answer to the second amended complaint on April 8, 2005. On May 3, 2005, Plaintiffs filed a motion for partial summary judgment, which is set for hearing on July 11, 2005. (\$65,216.88 as of April 30, 2005).

Galleon Bay – Three cases: (1) appeal of vested rights decision; (2) takings claim; and (3) third party complaint against State of Florida seeking contribution, indemnity and subrogation.

(1) On June 17, 2004, the 3rd D.C.A. denied the County's petition for writ of certiorari.

(2) As to the takings claim, Judge Payne entered summary judgment in favor of Plaintiff on liability on November 10, 2003, finding both a temporary and permanent taking of the subject property. Case was scheduled to proceed with a jury trial as to damages on August 9, 2004. At the pretrial conference on July 26, 2004, however, Judge Payne agreed to modify his order on liability to find only a permanent taking on April 21, 1994, and granted Plaintiff's request to continue the trial until October 12, 2004. Plaintiff's counsel was delegated the task of reducing the Court's announced ruling to a proposed modified order. On August 18, 2004, Judge Payne entered final judgment in favor of the County as to Plaintiff Hannelore Schleu. On September 24, 2004, the County submitted a proposed modified order consistent with the Court's July 26, 2004, ruling. On October 3, 2004, Plaintiff submitted a proposed modified order that substantively contradicted and strayed from the Court's ruling; namely, the proposed order found that a temporary taking occurred on April 13, 1997. On October 4, 2004, the Court entered verbatim Plaintiff's proposed modified order. The trial was subsequently continued until February 7, 2005. On October 22, 2004, the County filed a motion for rehearing arguing, *inter alia*, the verbatim entry of Plaintiff's proposed modified order violated the procedural due process rights of the County. On November 2, 2004, Plaintiff filed a reply to the County's motion for rehearing. On November 29, 2004, the County filed an amended motion for rehearing and/or motion for reconsideration. On December 13, 2004, the Court granted the County's motion and vacated the modified order of October 4, 2004. On April 27, 2005, Plaintiff filed its motion to amend summary judgment on liability and notice of confession of error (seeking to change taking date of April 21, 1994, to April 13, 1997). On May 5-6, 2005, pursuant to court order, the parties (including Third-Party Defendant State of Florida) participated in nonbinding arbitration before Gerald Kogan, Esq., a former member of the Florida Supreme Court. The issues arbitrated included (1) whether the taking found to have occurred by the trial court was permanent or temporary and (2) whether Monroe County is entitled to a contribution from the State as to all or a portion of the just compensation that Plaintiff is owed for the taking. Parties are awaiting rendering of Kogan's decision, which is expected by June 6, 2005. On May 18, 2005, the State filed objections to Plaintiff's motion to amend summary judgment order and requested a hearing on the motion.

(3) As to third party complaint against State of Florida, the State moved to dismiss for failure to state a cause of action, as well as a motion to transfer action to the Second Judicial Circuit in and for Leon County, Florida. On May 24, 2004, the court denied the State's motion to dismiss as to the County's claim of contribution, as well as the State's motion to transfer. On May 24, 2004, the State moved to substitute the Department of Community Affairs and the Administration Commission as third party defendants. On July 27, 2004, the State filed a notice of appeal to the 3rd D.C.A. of the non-final order denying the motion to transfer venue and petition for writ of prohibition/certiorari. On August 24, 2004, the Court granted County's motion to hold appeal in abeyance. On August 25, 2004, the Court denied County's motion to hold petition in abeyance. The Court has deferred the deadline for the County to file its response, pending resolution of matters in the underlying action. (\$184,255.85 as of April 30, 2005; does not include prior Galleon Bay matters).

Good – Plaintiff is seeking declaratory relief and takings claim for ~16 acre Sugarloaf Shores property due to commercial moratorium which began January 4, 1996. Plaintiff is also pursuing administrative requirements for filing a claim under the Bert Harris Act. The County's motion to dismiss is being held in abeyance until Plaintiff obtains a pre-application letter of understanding as to the level of development that is permissible on each parcel of property. Plaintiff and the County staff met on April 26, 2004, to discuss potential development. On February 14, 2005, the parties appeared before the court for a status conference. On February 17, 2005, Plaintiff Lloyd Good again met with County staff to discuss potential development. On March 7, 2005, the County issued a letter on the proposed development of Tracts A and B (property S. of U.S. 1). Planning staff is preparing a letter addressing the development potential of the remaining property at issue (property N. of U.S. 1). A case management conference before the court is scheduled for July 8, 2005. (\$14,963.42 as of April 30, 2005).

Phelps/Hardin – Plaintiffs filed claim in federal court for due process and inverse condemnation based on code enforcement proceedings that resulted in a lien on Plaintiffs' property. Federal court entered judgment in favor of Monroe County due to reinstatement of state court appeal of code enforcement order. On August 10, 2004, the County filed a motion to dismiss the state court appeal for lack of prosecution. On September 27, 2004, the Court dismissed the appeal. On October 5, 2004, Plaintiff/Appellant filed a motion for rehearing of order granting motion to dismiss appeal. On November 5, 2004, the Court entered an order granting Appellant's motion for rehearing and setting aside and vacating dismissal. (\$6,577.93 as of April 30, 2005).

Kalan - Takings claim filed as to residential property in Cahill Pines & Palms subdivision for failure to obtain ROGO allocation in 4 year period. Based on County's motion to dismiss, the parties agreed to entry of an order holding the case in abeyance while Plaintiff seeks a beneficial use determination, as required to exhaust available administrative remedies and ripen the case for judicial review. On June 24, 2004, the Court entered an order requiring the County to render a beneficial use determination as to subject property within 90 days. On September 21, 2004, the Court granted the County's motion for an extension of time, extending the deadline for the County to render a beneficial use determination until January 20, 2005. On October 26, 2004, a beneficial use hearing was held before the Special Master. The County filed another motion to extend the deadline for the rendering of a beneficial use determination, which remains pending. On March 4, 2005, the Special Master rendered a proposed denial of beneficial use, which is on the Board's June 15, 2005, agenda for consideration. (\$2,825.77 as of April 30, 2005).

Other Matters

Department of Community Affairs v. Monroe County - Case before Land and Water Adjudicatory Commission in which DCA alleges that the County failed to comply with various Comp Plan requirements by failing to routinely amend endangered species maps, and vegetation surveys as to high & moderate quality hammock areas. DCA also alleges that the County has allowed higher ROGO scores than should have been allocated due to failure to amend maps, thereby allowing more residential development than should have been approved. Case was set for administrative hearing in January 2004. DCA entered voluntary dismissal pending adoption of moratorium & revised regulations, but moved forward with appeals as to individual permits (see below). (\$14,796.42 as of April 30, 2005).

- **Department of Community Affairs v. Monroe County** - Pursuant to 380.07, *Florida Statutes*, DCA is appealing the building permit issued by Monroe County to Nancy Suarez-Cannon. DCA alleges that Monroe County did not correctly interpret and apply portions of its Comprehensive Plan and LDRs in scoring the application for development. On February 25, 2004, the ALJ dismissed Respondent Nancy Suarez-Cannon from the case because she sold the three subject lots to DC6, L.L.C. On May 4, 2004, DC6 (intervenor) sent settlement proposal to DCA in which it proposes to relocate the subject building permit to a neighboring cleared lot (the neighboring lot is the subject of a code enforcement proceeding in which the County alleges the lot was illegally cleared); the proposal has been rejected, but settlement negotiation remain ongoing. Final hearing is scheduled for June 7, 2005, in Tallahassee. (\$1,357.00 as of April 30, 2005).

O'Daniel and Hills v. Monroe County - Appellants/Petitioners filed a vested rights claim in Circuit Court on March 13, 2002. Appellants/Petitioners also appealed finding of Code Enforcement Special Master that they were conducting a commercial business on the subject, which is in a residential zoning district, without having first obtained a special use permit. The court affirmed the Special Master's finding and order. The vested rights claim went to bench trial on May 25, 2004. On October 7, 2004, the Court entered its final judgment in favor of Appellants/Petitioners. The Court held that Appellants/Petitioners have vested rights to maintain a mixed residential/commercial structure on the subject property, and to use the subject property for both residential and commercial office purposes. The relief granted to Appellants/Petitioners is relatively narrow compared to the relief sought. The Court, for example, held that (1) any application for a change in commercial use is subject to current regulations regarding non-conforming structures and uses, and (2) the commercial portion of the structure must substantially comply with current standard building, electrical, mechanical and plumbing codes before a certificate of occupancy is issued. The Court did not vacate its prior order affirming the Code Enforcement Special Master order. On November 4, 2004, Petitioners filed motions to tax costs and for attorney's fees pursuant to § 57.105, Fla. Stat. On November 11, 2004, the County filed a motion to strike Petitioners' motion for attorney's fees. The motion was heard on January 13, 2005; order granting the motion was entered on February 9, 2005. On March 7, 2005, Petitioners filed a notice of appeal as to the order granting the County's motion to strike. (\$29,446.72 as of April 30, 2005).

Industrial Communications & Electronics v. Monroe County – I.C.E. filed action against Monroe County in federal court alleging wireless tower moratoria violated the Federal Telecommunications Act of 1996 and the Fifth and Fourteenth Amendments to the United States Constitution. The district court granted the county's motion to dismiss on grounds of res judicata/collateral estoppel (claims were identical to those brought in state court action and plaintiff failed to reserve federal claims therein). I.C.E. appealed the decision to the 11th Circuit. County filed its answer brief on March 1, 2004. Federal appeals court mediation process stayed the appeal pending action on I.C.E.'s proposed settlement, which was presented to and rejected by BOCC. On May 27, 2005, the 11th Circuit vacated the judgment of the district court, but remanded with instructions to dismiss the complaint for lack of jurisdiction. (\$18,661.61 as of April 30, 2005).

Johnson - Writ of Mandamus challenging Director of Planning's determination that application for "boundary determination" by alleged error requires zoning map amendment application. Applicant applied for boundary determination based on allegation that BOCC previously adopted change in zoning. Director's determination was based on review of records failing to show any error or prior consideration of such zoning change. Director rejected application and informed owner to properly file for zoning map amendment. (Boundary determination may be placed on BOCC agenda without the public notice required for a zoning change). Pursuant to oral argument, Monroe County agreed to re-process application for denial or approval (application was previously returned as incomplete) and Plaintiffs may appeal as provided by the Monroe County Code if denied. On May 26, 2005, opposing counsel submitted a proposed final judgment for the County's consideration. (\$1,829.62 as of April 30, 2005).

Sierra Club, et al. v. Department of Community Affairs & Miami-Dade County (Monroe County as Intervenor) - On October 10, 2002, the Miami-Dade County Board of County Commissioners approved Ordinance No. 02-198, which amends the Land Use Element and Transportation Element of Miami Dade's Comprehensive Growth Management Plan to change the designation of Krome Avenue from a "Minor Roadway" (2 lanes) to a "Major Roadway" (3 or more lanes). On January 10, 2003, Petitioners filed a petition for formal administrative hearing to challenge DCA's finding that this and other amendments to the Miami-Dade's Plan are "in compliance" as defined in section 163.3184(1)(b), Fla. Stat. On December 16, 2003, the ALJ granted Monroe County's petition to intervene. On March 22, 2004, Miami-Dade filed a motion to relinquish jurisdiction to DCA. In December 2004, the parties reached a tentative settlement agreement, but the Board of County Commissioners of Miami-Dade County formally rejected the agreement on March 1, 2005. On April 11, 2005, City of Homestead filed its petition for leave to intervene (in support of Miami-Dade); DOAH granted the petition on May 4, 2005. On May 11, 2005, Petitioners filed their response to Miami-Dade's motion to relinquish jurisdiction; the response was adopted by Monroe County. The case is set for final hearing on September 19 through 23 and 26 through 30, 2005. (Legal services are being provided by Morgan & Hendrick without charge to Monroe County).

Smart Planning and Growth Coalition v. Monroe County (Circuit Court Case No. 03-CA-507-P) - SPGC challenge of NROGO allocations based on allegation that allocations violate NROGO/Comp Plan provisions because Key Largo CommuniKeys Master Plan not yet adopted. Case was dismissed by DOAH for lack of jurisdiction. Plaintiffs filed action in circuit court on same grounds. County prevailed on its motion to dismiss for lack of jurisdiction on grounds that plaintiff is not an "aggrieved party," as required by section 163.3215, *Florida Statutes*. Plaintiffs filed an amended complaint on February 20, 2004. County filed its answer on March 5, 2004. (\$474.49 as of April 30, 2005).